IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-573

RICHARD KAVNER,

Petitioner,

v.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, A CORPORATION, LHI-688 EMPLOYEES RETIREMENT AND PENSION PLAN TRUST, PHILIP L. GOODWILLING, LEVI SANFORD, ERNST NEIDEL, PAUL AKERS, RONALD GAMACHE, MICHAEL DUNN, KENNETH CARROLL, JAMES JOINER, CHICK THORNTON AND JOHN BECKER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION OF OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA

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BRIEF IN OPPOSITION OF OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA

Respondent Occidental Life Insurance Company of California ("Occidental") opposes the granting of the petition for certiorari of Richard Kavner. For the reasons set forth in Occidental's petition in Docket No. 79-568, the decision of the Eighth Circuit in this case raises Federal issues of substantial importance and should be reviewed by this Court.[1] Those reasons, however, are unrelated to and not raised by Kavner's peti-

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[1] All references hereinafter to "Occidental's petition" are to the petition filed by Occidental in Docket No. 79-568.

tion here. The Eighth Circuit was correct in its determinations that Kavner had "perpetrated a fraud on the plan" in claiming a service commencement date of 1939, that he had incurred a "break in service" under the Local 688 pension plan by not having been granted a written leave of absence by Local 688 with respect to a nearly six-year period during 1958-1963 when he was employed by the International Brotherhood of Teamsters in Washington, D.C., and that therefore he had never been entitled to benefits under the plan. In any event, the petition of Richard Kavner raises no issues appropriate for review by this Court.

At page ten of his petition Kavner states: "The trial court's decision was not based upon ERISA, and no issue is raised with regard to that act herein." The arguments that are advanced in Kavner's petition essentially reduce to two basic contentions: (1) that the plan trustees' denial of his benefits was improper *under state law* (a contention which his petition, at page 12, states is governed by whether the plan trustees acted "arbitrarily or capriciously" in "retroactively" applying to him the clear plan requirement of a written leave of absence); and (2) that even if he was not entitled to benefits under the Local 688 pension plan, he was somehow, *again under state law,* entitled to benefits as a third-party beneficiary of the plan funding contract between Occidental and the plan trustees. The Eighth Circuit considered these state law arguments and determined them to be without merit.

Occidental, in its petition at pages 13-18, argues that the reliance on state law evident in both Kavner's petition and in the decision of the Eighth Circuit is misplaced. Kavner's claims regarding the April 25, 1975 termination of his benefits by the plan trustees should

have been treated as governed by Federal law under section 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), which totally preempts, effective January 1, 1975, all state laws relating to any employee benefit plan covered by ERISA.

Because this case arises during the so-called "gap" period between the January 1, 1975 effective date of the ERISA preemption provision and the subsequent effective dates of various substantive provisions of ERISA, the appropriate Federal standard to be applied under ERISA is, for the reasons discussed at pages 17-18 of Occidental's petition, whether the trustees acted "arbitrarily or capriciously" in terminating Kavner's benefits. The Eighth Circuit specifically held that "the trustees acted reasonably . . . in discontinuing Kavner's $1,200 monthly benefit because of his break in service and seeking to recover the related overpayments." 602 F.2d at 1279. Thus, with respect to the termination of Kavner's benefits, the Eighth Circuit applied the correct legal standard even though it did not apply the proper law.

With respect to the Eighth Circuit's holdings of liability against Occidental and the trustees, on the other hand, application of state rather than Federal law clearly did result in application of an incorrect legal standard. See Occidental's petition at pages 17-22.

Kavner's argument that a conflict exists among the Circuits is fallacious. The cases he cites (at page 14 of his petition) involve situations in which plan trustees administering so-called Taft-Hartley plans were given discretion to establish eligibility rules and, after doing so, attempted to change those rules retroactively without sufficient justification. The decision below is not in

conflict with these cases because the instant case does not involve a change in the rules but rather the application of a rule which the Eighth Circuit held (602 F.2d at 1278) was clearly stated in the plan document.

There is simply no reason for this Court to review the Eighth Circuit's holding that the 1975 decision of the plan trustees was not arbitrary or capricious. The fact of the matter is that the trustees were enforcing an *unambiguous, unaltered* provision of the plan providing that "Credited Service" would not be "broken" if an employee were "on a leave of absence *authorized in writing* by the Employer. . . ."[2] Kavner's theory is that the written leave requirement was to be "prospective" only (*i.e.*, that it was not to apply to periods during which a plan participant was absent from Local 688 prior to the adoption of the plan in 1968), that the trustees so "interpreted" it in 1971, and that the current plan trustees impermissibly "changed the rules" after he retired. This theory raises no issue for this Court's review. It simply presents a factual question.[3]

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[2] The term "Credited Service" is defined in the plan itself to be the sum of "Credited Past Service" and "Credited Future Service." "Credited Past Service" is defined in terms of service *prior to* the January 1, 1968 effective date of the plan. Thus, the plan clearly contemplates "retroactive" application of the written leave of absence requirement. It should be noted that Kavner had in fact received written leaves for two periods of absence before his break in service during 1958-1963.

[3] Kavner's theory will not wash because, among other reasons, any prospective only "interpretation" would have been contrary to the *written* leave requirement of the plan and would have been inconsistent with the plan requirement that the leave of absence provisions be applied on a uniform and nondiscriminatory basis in that the written leave requirement was in fact applied to other employees who moved from Local 688 to other Teamster organizations.

Kavner's final argument in his petition (at pages 17-18) is that even if the trustees properly determined in 1975 that Kavner had never been entitled to benefits under the plan, Occidental remained liable to Kavner under state contract law by virtue of the funding contract between Occidental and the plan trustees. In the funding contract, however, Occidental agreed only to "provide and guarantee all benefits *which shall become payable under the Plan*" with respect to specified participants listed in Exhibit B to the contract. (Emphasis added.) Since Kavner did not meet the eligibility requirements of the plan, no benefits became payable to him thereunder. While Occidental and the plan (acting through its trustees) agreed that the age and service data set forth on Exhibit B would be "binding and conclusive," that statement meant only that the data was binding as between Occidental and the plan since it was on the basis of that data that Occidental extended to the trustees its conditional guarantee of the actuarial soundness of the plan. The statement plainly was not intended to insulate plan participants from the consequences of claiming improper ages or service dates.[4]

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[4] Kavner implicitly admits as much by expressly declining (at page 6, n.4, of his petition) to raise the issue of the correct starting date for determining his "Credited Service" under the plan. On Exhibit B to the funding contract, and in the courts below, Kavner claimed service commencing in 1939. The Eighth Circuit, however, concluded that he had not been employed by Local 688 at any time before 1949. Allowing Kavner to bootstrap an entitlement to benefits by virtue of having claimed incorrect service data on Exhibit B would be inconsistent with both the plan's requirement of uniform and nondiscriminatory application of the written leave of absence provisions and the requirement of Internal Revenue Code section 401(a)(4), 26 U.S.C. § 401(a)(4), that a tax-exempt qualified pension plan not discriminate in favor of officers.

Insofar as the denial of Kavner's benefits is concerned, this case simply involves the application of a clear rule which is and always has been stated in the plan. Thus, it is at best hyperbolic to suggest, as Kavner's petition does (at pages 14-15), that the decision below invites the use of pensions as "instruments for political retaliation and retribution" or that it "threatens the stability of all pensions." The denial of Kavner's benefits invites nothing and threatens no one with anything more than the termination and attempted recoupment of benefits which should not have been paid in the first instance.

CONCLUSION

For the reasons expressed above, the petition of Richard Kavner for a writ of certiorari should be denied.

Respectfully submitted,

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